Supreme Court, U.S.
FILED
JUL 6 1992
OFFICE OF THE CLERK

No. 91-1748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MALCOLM PIRNIE, INC.,
Petitioner,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF AMICUS CURIAE OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION IN SUPPORT OF THE PETITIONER

RONALD A. LINDSAY
Counsel of Record
STUART B. NIBLEY
JOSEPH R. DAMATO
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400
Counsel for the Amicus Curiae National Security Industrial Association

July 6, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
ARGUMENT	5
THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE THE CONFLICT AMONG THE FEDERAL COURTS CONCERNING THE INTERPRETATION OF THE SALARY BASIS REGULATIONS	5
A. There Is A Conflict Among The Courts On The Issue Of Whether An Employee's Pay Must Actually Be Reduced Because Of Partial Day Absences Before He Is No Longer Considered Salaried	6
B. There Is A Conflict Among The Courts On The Circumstances Under Which An Employer May Utilize The Window Of Correction To Preserve An Employee's Exempt Status	9
CONCLUSION	13

TABLE OF AUTHORITIES

Cases: Page

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785 (1991) 6, 7
Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta, 920 F.2d 800 (11th Cir. 1991) 7
Harris v. District of Columbia, 709 F. Supp. 238 (D.D.C. 1989) 7
Hartman v. Arlington County, 720 F. Supp. 1227 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990) 9, 10
International Ass'n of Firefighters, Alexandria Local 2141 v. City of Alexandria, 720 F. Supp. 1230 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990) 11
Keller v. City of Columbus, 778 F. Supp. 1480 (S.D. Ind. 1991) 10
Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991) ..... *passim*
Oliver v. United States Postal Serv., 696 F.2d 1129 (5th Cir. 1983) 11
Sarver v. City of Roanoke, 29 Wage & Hour Cas. (BNA) 1442 (W.D. Va. 1989) 11
Service Employees Int'l Union, Local 102 v. County of San Diego, 784 F. Supp. 1503 (S.D. Cal. 1992) 8
United States v. Systems Architects, Inc., 757 F.2d 373 (1st Cir.), *cert. denied*, 474 U.S. 847 (1985) 3
Usery v. Kennecott Copper Corp., 577 F.2d 1113 (10th Cir. 1977) 11

Statutes and Regulations:

10 U.S.C. § 2306a 2
29 U.S.C. § 201 *et seq.* ..... *passim*
29 U.S.C. § 207 5
29 U.S.C. § 213(a)(1) 5
29 C.F.R. § 541.118 ..... *passim*
48 C.F.R. §§ 30.000-30.603 2
48 C.F.R. §§ 31.000-31.205-52 2

TABLE OF AUTHORITIES—Continued

Page

48 C.F.R. § 52.216-7 2
48 C.F.R. § 52.216-16 2
56 Fed. Reg. 45,824 (1991) 12, 13

Miscellaneous:

Guidelines for a Comprehensive Audit of Labor Costs, DCAA Pub. No. 7641.88 (1984) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1748

MALCOLM PIRNIE, INC.,
Petitioner,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF AMICUS CURIAE OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

With the consent of the parties,[1] the National Security Industrial Association ("NSIA") respectfully submits this brief *amicus curiae* in support of the petition of Malcolm Pirnie, Inc. ("Malcolm Pirnie").

NSIA is a national organization of some 400 manufacturing, research, and service companies from all segments of industry that provide goods and services in

---

[1] The appropriate consent letters have been filed with the Clerk of the Court.

support of the United States' national security needs. NSIA's membership includes most of the American manufacturing companies on the Department of Defense's annual list of contractors that receive the largest volume of awards. In addition, NSIA's membership includes many small- and medium-sized companies that provide goods and services to the federal Government. One of NSIA's most important functions is the presentation of the views of its members on issues of Government regulation.

The case at bar has the potential to affect virtually every member of NSIA. Many of the contracts awarded by the federal Government are cost-reimbursement or price-redeterminable contracts. Regulations provide that under a cost-reimbursement contract, a contractor may be reimbursed only those costs that are both allowable and properly allocable to the contract. 48 C.F.R. § 52.216-7 (1991). Similarly, regulations provide that under a price-redeterminable contract, price will be redetermined only on the basis of allowable costs properly allocated to the contract. 48 C.F.R. § 52.216-16 (1991). The determination of what costs are allowable and to which contract(s) they are allocated is based principally on the cost principles set forth in the federal acquisition regulations, 48 C.F.R. §§ 31.000-31.205-52 (1991), and on the Government's Cost Accounting Standards, 48 C.F.R. §§ 30.000-30.603 (1991). Other requirements may result from conditions imposed by Government auditors, such as the Defense Contract Audit Agency ("DCAA").

These and other applicable regulations require federal contractors to maintain accurate and detailed time records.[2] In general, federal contractors must ensure that

---

[2] This requirement often applies even when a contractor performs under a fixed price contract. Contractors are required to maintain detailed records of employee time charging for purposes of confirming entitlement to progress payments on the basis of costs incurred and for the purpose of complying with the Truth in Negotiations Act, 10 U.S.C. § 2306a.

their employees record time actually worked on specific projects each day. Failure to follow proper procedures can lead to civil and criminal sanctions. *E.g.*, *United States v. Systems Architects, Inc.*, 757 F.2d 373, 376 (1st Cir.), *cert. denied*, 474 U.S. 874 (1985) (contractor convicted of fraud for, among other actions, improperly shifting labor costs allocable to specific contracts to overhead accounts).

The importance the Government places on maintaining detailed and accurate time records is evident from the DCAA's Guidelines for a Comprehensive Audit of Labor Costs, Pub. No. 7641.88 (1984). The introduction to this manual states that "[t]he cost of labor at many contractor locations is the most sensitive cost element that DCAA is required to audit" and "the accurate recording of labor costs by contractor employees [is] of utmost importance." *Id.* at 1.

In light of the demand that contractors maintain detailed time records so that the Government will be charged only for time worked, the decision of the U.S. Court of Appeals for the Second Circuit in *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), poses special problems for contractors. In holding that otherwise exempt employees could be entitled to overtime compensation under the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. § 201 *et seq.*, if they were subject to a policy that might reduce their compensation for fractions of days missed from work. the court of appeals indicated that no actual reduction in pay need have occurred for the exemption to be lost. Thus, the court stated that "an employee who *can* be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee." *Malcolm Pirnie*, 949 F.2d at 615 (emphasis added). A contractor's requirement that its employees account for each hour, or fraction thereof, of the workday readily lends itself to misinterpretation as a policy whereby employees, including salaried employees,

can have their pay reduced for not working a full day. To ensure that contractors are not embroiled in needless litigation, salaried employees should not lose their exempt status unless their pay actually has been improperly reduced.

Furthermore, the Second Circuit's decision was predicated on an unreasonable and excessively narrow interpretation of a Department of Labor regulation that allows an employer, in appropriate circumstances, to avoid the loss of an employee's exempt status by refunding any improperly deducted amounts. The regulation in question, known as the "window of correction," states that:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6) (1991). Despite the fact that the regulation's plain language would allow employees to retain their exempt status as long as they were made whole and the deductions from their pay were inadvertent or for reasons other than lack of work, the court of appeals concluded that this remedial procedure was unavailable to Malcolm Pirnie because it was not compensating the employees in question on a salary basis. The court of appeals reasoned the employees were not salaried because a Malcolm Pirnie policy guide that addressed, in part, proper timekeeping procedures could be read as "allow[ing] proportional salary deductions for *all* em-

ployees . . . who did not complete full eight hour days." *Malcolm Pirnie*, 949 F.2d at 616. Here again, the Second Circuit's decision has potentially devastating implications for contractors. A contractor's policies regarding the recording of hours worked may prevent it from utilizing the "window of correction" and remedying technical errors in a salaried employee's compensation, and consequently all of the contractor's salaried employees may lose their exempt status.

Because of the significance of the Second Circuit's decision for the Government contracting community, NSIA respectfully submits this brief *amicus curiae* and urges the Court to grant Malcolm Pirnie's petition for a writ of certiorari.

ARGUMENT

THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE THE CONFLICT AMONG THE FEDERAL COURTS CONCERNING THE INTERPRETATION OF THE SALARY BASIS REGULATIONS

The FLSA requires payment of overtime compensation for hours worked in excess of forty in a workweek. 29 U.S.C. § 207. However, an employer does not have to provide overtime compensation to those employees who are exempt from coverage under the Act.

The exemption most frequently invoked, and the one relevant to this case, exempts from the overtime requirements of the FLSA "any employee employed in a bona fide executive, administrative or professional capacity." 29 U.S.C. § 213(a)(1). For an employer successfully to claim this exemption for a particular employee, the employer must establish that the employee has duties consistent with the status of an "executive, administrative or professional" employee and is paid on a salary basis. Department of Labor regulations specify the conditions under which an employee will be regarded as being paid on a salary basis:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, *which amount is not subject to reduction because of variations in the quality or quantity of work performed.* Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(a) (1991) (emphasis added).[3]

A. There Is A Conflict Among The Courts On The Issue Of Whether An Employee's Pay Must Actually Be Reduced Because Of Partial Day Absences Before He Is No Longer Considered Salaried

In *Malcolm Pirnie*, the Second Circuit has concluded that an employee's compensation is "subject to reduction" within the meaning of the relevant regulation whenever his or her employer has a policy or practice that could result in the employee being docked for partial day absences. The Second Circuit is joined in this conclusion by the U.S. Court of Appeals for the Ninth Circuit which held in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785 (1991), that whether deductions actually have been made from an employee's pay is "irrelevant." *Id.* at 487. The Ninth Circuit reasoned that:

---

[3] Subsections (a)(1) through (a)(5) of the regulation discuss the nature of the exceptions to the rule that a salaried "employee must receive his full salary for any week in which he performs any work." Generally, deductions for absences of a day or more are allowed, whereas deductions for partial day absences are not permitted. As indicated, subsection (a)(6) sets forth the procedure for remedying certain improper deductions.

> The dispositive factor is [whether] the employee's pay is at all times "*subject to*" deductions for tardiness or other occurrences. Either pay is fixed and immutable, and not subject to such deductions, or it is contingent. . . . Section 541.118(a) does not require that a deduction for an absence of less than a day *actually* have been made, but only that an employee's pay be "*subject to*" such a deduction.

Id.

However, other federal courts have interpreted the regulation differently. Thus, the U.S. Court of Appeals for the Eleventh Circuit recently dismissed a challenge to the exempt status of certain employees that was based on a city ordinance allegedly requiring a deduction from the compensation of any city employee for tardiness of violations or other work rules. *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800 (11th Cir. 1991). The court observed that the plaintiff "presented no evidence to prove that any [employee] ever suffered a reduction in pay" as a result of application of the ordinance, and therefore the exempt employees's pay was not actually "subject to reduction because of the quality or quantity of work." *Id.* at 805. Similarly, in *Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989), the court held that it could not conclude that the exemption had been lost on the basis of a leave policy that potentially might result in deductions for partial day absences. The court observed that the regulations themselves provide that "[t]he effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case." 29 C.F.R. § 541.118(a)(6) (1991). Consequently, the "implicit rule" of the regulations, when read in their entirety, "is to determine an employee's actual status under the Act based on the facts and circumstances surrounding an unauthorized deduction," rather than on the basis of conjecture about the possible effects of an employer's policies. *Harris*, 709 F. Supp. at 241.

The decisions in *Atlanta Professional Firefighters Union* and *Harris* provide the only reasonable interpretation of the Act and its implementing regulations. Conclusions about the effects of an employer's compensation policies on a salaried employee's partial day absences must remain speculative if the policies have not yet resulted in deductions for partial day absences. Uncertainty about the significance of an employer's compensation policies is compounded when the employer is a contractor that must comply with strict regulatory requirements and policies regarding the recording of employee time actually worked. Directions to employees to note partial day absences on their time records can suggest that employees are "subject to" deductions on account of those absences.

Already one federal court has drawn this improper inference. In *Service Employees International Union, Local 102 v. County of San Diego*, 784 F. Supp. 1503 (S.D. Cal. 1992), the court decided that a group of employees was not salaried, and therefore not exempt from overtime regulations, because they had to comply with certain work rules, including a requirement to record their time. The court observed that:

> Although the County asserts that "no one has testified about punching a 'time clock,'" plaintiffs are required to work set hours, to seek and obtain permission to be away from work during those hours, and to record the time that they work on some form of time sheet or time card. . . . Such rigid attendance and time keeping requirements are not consistent with salaried status.

Id. at 1510.

The holding in *Service Employees International Union* underscores the dangers inherent in the Second Circuit's decision in *Malcolm Pirnie*. If the Second Circuit's decision in *Malcolm Pirnie* is allowed to stand, entire classifications of otherwise exempt employees could lose their

exemption on the basis of a hypothetical deduction that may never be made—with severe consequences for the employer in terms of liability for overtime compensation.

B. There Is A Conflict Among The Courts On The Circumstances Under Which An Employer May Utilize The Window Of Correction To Preserve An Employee's Exempt Status

The Second Circuit refused to recognize Malcolm Pirnie's right to utilize the window of correction to remedy the effects of a very limited number of deductions from the salaries of a few employees.[4] The Second Circuit ruled that the window of correction was not available to Malcolm Pirnie because (1) this remedial procedure may only be utilized with respect to salaried employees and (2) the employees in question were not salaried as Malcolm Pirnie "maintained a policy of docking pay . . . for fractions of the workday . . . missed." *Malcolm Pirnie*, 949 F.2d at 617. The court's conclusion that Malcolm Pirnie maintained such a policy was based on a company manual that addressed, in part, proper timekeeping procedures. *Id.* at 616. In essence, the court of appeals held that an employer must satisfy all the criteria of the salary basis test set forth in the regulation before it can avail itself of a procedure that permits an employer to remedy its failure to meet some of these criteria. For all practical purposes, the Second Circuit has eliminated the window of correction.

Other federal courts disagree with the Second Circuit's strained reading of the regulation. For example, in *Hartman v. Arlington County*, 720 F. Supp. 1227 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990), the court concluded the window of correction was avail-

---

[4] There is no dispute that Malcolm Pirnie fulfilled the requirements of the window of correction by reimbursing the employees for any pay that may have been deducted and by revising its procedures to prevent improper deductions in the future.

able to the employer despite the plaintiffs' contention that their pay had been docked pursuant to a policy that resulted in employees being compensated only for hours actually worked if they worked a partial shift. *Id.* at 1229. The court found the employer was entitled to use the window of correction provided it complied with the requirements set forth in the regulation itself. The court noted that pursuant to the express language of 29 C.F.R. § 541.118(a)(6) the overtime exemption is not lost as a result of improper deductions provided "the employer reimburses the employee and promises to comply in the future." *Id.* at 1229-30. The U.S. Court of Appeals for the Fourth Circuit affirmed this decision "on the reasoning of the lower court." *Hartman*, 903 F.2d at 292.

The decision in *Keller v. City of Columbus*, 778 F. Supp. 1480 (S.D. Ind. 1991), is also instructive. Ruling that a written policy that could have resulted in prorated hourly deductions in pay for certain absences did not foreclose use of the window of correction when the city clarified its policy to avoid improper deductions, the court cautioned that it was important not to "lose[] sight of the purpose of 29 C.F.R. § 541.118(a)(6)." *Id.* at 1487. As explained by the court:

> The former policy of hourly deductions allowed by [the written policy] does not go to the pith of the employment relationship; rather, it is simply a trap that may place in jeopardy a salaried status already established. As the regulation's text and previous cases have shown, the "window of correction" applies rather broadly; employers will not be penalized for technical errors that do not go to the substance of the relationship.

Id. The *Hartman* and *Keller* decisions recognize the importance of focusing on the substance of the employment relationship whereas the Second Circuit's decision in *Malcolm Pirnie* elevates form over substance and in the process renders useless the window of correction. Not surprisingly, several other federal courts are in accord

with *Hartman* and *Keller*. *See, e.g., International Ass'n of Firefighters, Alexandria Local 2141 v. City of Alexandria*, 720 F. Supp. 1230, 1232 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990); *Sarver v. City of Roanoke*, 29 Wage & Hour Cas. (BNA) 1442, 1444 (W.D. Va. 1989).

The plain language of the regulation reveals the error in the Second Circuit's reasoning. In concluding that an employer's policies must satisfy all the criteria of the salary basis test before the window of correction can be utilized, the court of appeals ignored the regulation's unmistakable distinction between deductions that indicate the employee is not being treated as salaried and deductions that, while arguably improper, are not destructive of the employee's salaried status. Thus, the first two sentences of the window of correction state that:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis.

29 C.F.R. § 541.118(a)(6) (1991). Deductions made for lack of work are evidence that the employee is really an hourly worker; other deductions do not necessarily bear that implication. It is for this reason that the regulation goes on to state that the exemption will not be considered lost if an arguably improper deduction is inadvertent or made for reasons other than lack of work, provided the employer carries out the stipulated remedial procedures.

The plain language of a regulation should control its interpretation. *Oliver v. United States Postal Serv.*, 696 F.2d 1129, 1131 (5th Cir. 1983); *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1118-19 (10th Cir. 1977). Here, however, the Second Circuit has tortured the plain language of the regulation to yield a result that is inconsistent with the evident intent of the regulation and illogical and impractical as well.

The impracticality of the Second Circuit's interpretation is made manifest by considering its ramifications. No employer will be allowed to correct arguably improper deductions—however few in number—provided there is some sort of policy or procedure, including timekeeping procedures, that could explain the deductions. In other words, the Second Circuit would allow the window of correction to be used only in cases of arithmetic error or, perhaps, cases of mistaken identity. As a result, many employers could be facing millions of dollars in overtime compensation liability even though the amount of improper deductions they may have made from employees' salaries was minuscule.[5]

Concern by state and local government over the vagaries of the courts' interpretations of the salary basis regulations has already prompted the Department of Labor to propose a rule granting regulatory relief to public employers by effectively exempting them from the "no partial day deduction" criterion at issue in the instant case. *See* 56 Fed. Reg. 45,824 (1991) (to be codified at 29 C.F.R. § 541.5d) (proposed Sept. 6, 1991). In justifying the proposed rule, the Department of Labor explained that the salary basis regulations had produced a confusing and contradictory body of case law, adding that:

> These diverging judicial interpretations and accompanying confusion have developed, resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined.

Id. at 45,825.

---

[5] Malcolm Pirnie made arguably improper deductions valued at less than $3,300 from a small group of employees. If the Second Circuit's decision is not overturned Malcolm Pirnie would owe approximately $2,000,000 in overtime compensation to nearly 400 employees.

These diverging judicial interpretations and accompanying confusion affect private employers as well, and private employers are similarly exposed to potentially enormous and generally unexpected back pay liabilities. However, the Department of Labor has stated that it will *not* attempt to eliminate this confusion with respect to "private sector pay systems." *Id.* Accordingly, this Court should resolve this important question of federal law which has divided the lower courts.

CONCLUSION

For all the foregoing reasons, NSIA respectfully urges this Court to grant the petition for certiorari.

Respectfully submitted,

RONALD A. LINDSAY
Counsel of Record
STUART B. NIBLEY
JOSEPH R. DAMATO
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400
Counsel for the Amicus Curiae National Security Industrial Association

July 6, 1992